No. 14-1504

IN THE

# Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY J. FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

*Appellants,*

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

*Appellees.*

**On Appeal from the United States District Court for the Eastern District of Virginia**

## SUPPLEMENTAL BRIEF FOR APPELLEES GLORIA PERSONHUBALLAH AND JAMES FARKAS ON STANDING


KEVIN J. HAMILTON
ABHA KHANNA
PERKINS COIE LLP
1201 Third Avenue
Suite 4900
Seattle, WA 98101-3099
(206) 359-8000

MARC E. ELIAS
*Counsel of Record*
JOHN M. DEVANEY
ELISABETH C. FROST
PERKINS COIE LLP
700 Thirteenth Street, NW
Suite 600
Washington, D.C. 20005-3960
(202) 654-6200
MElias@perkinscoie.com

*Counsel for Appellees Gloria Personhuballah & James Farkas*


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**SUPPLEMENTAL BRIEF FOR APPELLEES GLORIA PERSONHUBALLAH AND JAMES FARKAS**

This supplemental brief, filed pursuant to the Court's Order issued September 28, 2015, addresses the following question:

> Whether Appellants, Republican current and former members of Congress who intervened as Defendants in the action below, none of whom live in, currently represent, or have ever represented the *only* congressional district at issue in this racial gerrymandering action, have standing under Article III of the U.S. Constitution to pursue this appeal, when the State Defendants have not sought appellate review.

For the reasons that follow, Appellants do not have standing and this appeal should be dismissed.

## I. BACKGROUND

This action was originally filed on October 2, 2013, by voters who reside in Virginia's bizarrely-shaped Third Congressional District ("CD3"). Appellants are current and former Republican members of Congress who represent or represented the following districts: CD1 (Robert J. Wittman), CD2 (Scott Rigell), CD4 (Randy J. Forbes), CD5 (Robert Hurt), CD6 (Bob Goodlatte), CD7 (David Brat, current; Eric Cantor, former), CD9 (Morgan Griffith), and CD10 (Barbara Comstock, current; Frank Wolf, former). Appellants were not named as Defendants, but intervened below to defend against the voters' claim that CD3 is a racial gerrymander in violation of the Equal Protection

Clause of the Fourteenth Amendment.[1]

On October 7, 2014, after a trial, the district court, constituted as a three-judge panel (the "Panel"), issued an opinion finding CD3 to be an unconstitutional racial gerrymander. Appellants—but not the originally named State Defendants—sought direct review of this Court. *See* Jurisdictional Statement, *Cantor v. Personhuballah* (U.S. Oct. 31, 2014) (No. 14-518). Virginia voter Appellees Gloria Personhuballah and James Farkas (the "Voter Appellees") filed a motion to dismiss or affirm the appeal, in which they argued (among other things) that Appellants lacked Article III standing. *See* Mot. to Dismiss or Affirm, *Cantor v. Personhuballah* (U.S. Dec. 4, 2014) (No. 14-518). While that motion was pending, the Court decided *Alabama Legislative Black Caucus v. Alabama*, which held that a three judge panel reviewing a racial gerrymandering claim in Alabama had "applied incorrect legal standards in evaluating the claims." 135 S. Ct. 1257, 1262 (2015). Shortly thereafter, the Court vacated and remanded the Panel's decision "for further consideration in light of" the opinion in *Alabama*. Order Vacating & Remanding Case, *Cantor v. Personhuballah* (U.S. Mar. 30, 2015) (No. 14-518).[2]

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[1] Cantor, Wittman, Goodlatte, Wolf, Forbes, Griffith, Rigell and Hurt intervened as Defendants in December 2013. Order Granting Mot. to Intervene, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Dec. 3, 2013), ECF No. 26. Wolf announced his retirement in December 2013, and Cantor was defeated in the Republican primary by Appellant Brat in June 2014. Brat and Comstock (who won the seat that Wolf previously held) intervened when the case was before the court below on remand. Order Granting Mot. to Intervene, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. May 11, 2015), ECF No. 165.

[2] The Court's order vacating and remanding the Panel's original decision expressed no opinion on the substantive issues raised

Upon remand, the Panel ordered the parties to "file briefs regarding the effect, if any," of the *Alabama* decision "on this case." Scheduling Order, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Apr. 2, 2015), ECF No. 144. On June 5, after consideration of that briefing and expressly applying *Alabama*, the Panel again concluded that CD3 was an unconstitutional racial gerrymander. *See* JS 13a & n.11, 39a-42a, 43a. The Panel enjoined any further elections under the current congressional apportionment plan and gave Virginia's General Assembly until September 1 to adopt a remedial plan. JS 94a.

Again, Appellants sought review of the Panel's decision, filing a jurisdictional statement on June 22. And again, the Voter Appellees filed a motion to dismiss or affirm, which argued, among other things, that Appellants lack Article III standing to independently pursue this appeal. *See* Voter Appellees' Mot. to Dismiss or Affirm, at 6-8. The State Defendants not only did not join Appellants in the appeal; they filed a motion requesting that the Court affirm the Panel's decision. *See* Mot. to Affirm by Va. State Bd. of Elections Appellees.

Since Appellants' jurisdictional statement and the motions to affirm or dismiss have been filed, several important things have occurred. *First*, the Virginia House of Delegates and Virginia Senate moved in the

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by the parties, including the issue of Appellants' standing. This approach is consistent with the prohibition on advisory opinions and the canon of constitutional avoidance. If the Panel found that application of *Alabama* dictated a different result, the Court would have no need to decide whether Appellants could maintain a direct appeal without participation of the State Defendants. And, because the State Defendants had standing to defend the action before the Panel, Appellants' lack of standing would not require dismissal of the district court action.

district court to extend the deadline for approval of a remedial plan from September 1 to November 16. Mot. for Extension of Time to Comply With Court Order, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. July 15, 2015), ECF No. 192. That motion was denied on the grounds that the movants "failed to show that (1) the [Appellants] are likely to succeed in the appeal pending before the Supreme Court, or (2) they will suffer irreparable injury or prejudice by adhering to the Court's September 1, 2015 [deadline] for adopting a new redistricting plan." Order Denying Mot. for Extension of Time, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Aug. 5, 2015), ECF No. 201. *Second*, although the Governor of Virginia convened the General Assembly for a special session in August 2015 for the purposes of drawing and approving a new plan, the legislature did not pass a new map.

As a result, the Panel has undertaken the process of approving a remedial plan itself. To assist it, the Panel set a deadline of September 18 for anyone who wished to submit proposed remedial plans for consideration, with all "briefs or other written comments to the proposed plans, maps, and briefs" due October 7. Scheduling Order, *Personhuballah v. Alcorn*, No. 3:13cv678 (E.D. Va. Sept. 3, 2015), ECF No. 207. Appellants submitted two maps, the Voter Appellees submitted one, and outside groups and individuals who were not previously party to these proceedings submitted several more.[3]

Appellants describe the plans that they have submitted as being "narrowly drawn to fix the defect in

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[3] All of the proposed plans are available on Virginia's Division of Legislative Services (DLS) website, per the Panel's express order. *See* Order Regarding Proposed Remedial Plans, *Personhuballah v. Alcorn*, No. 3:13cv678 (E.D. Va. Sept. 23, 2015), ECF No. 237.

[CD3] identified by the Court" while at the same time protecting incumbents "to maintain the 8-3 partisan division established in the 2010 election." Intervenor-Defendants' Br. In Support of Their Proposed Remedial Plans 2, *Personhuballah v. Alcorn*, No. 3:13cv678 (E.D. Va. Sept. 18, 2015), ECF No. 232. Specifically, Appellants' remedial plans would reduce the Republican vote share in CD2, currently represented by Congressman Rigell by "only 0.6%," *id.* at 13, and "preserve the majority-Republican vote share in the 7 other districts . . . represented by [the other Appellants currently serving as Republican members of Congress]," *id.* at 13-14.

On September 28, this Court issued an order directing the parties "to file supplemental briefs addressing" the question of "[w]hether appellants have standing under Article III of the United States Constitution." Order List, 576 U.S. ___ (Sept. 28, 2015). For the reasons that follow, the Court should answer that question in the negative, and dismiss this appeal.

## II. LEGAL STANDARD

Article III of the Constitution limits the jurisdiction of federal courts to matters that present "cases" or "controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). "For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). Rather, all litigants must be able to demonstrate that they (1) have suffered "a concrete and particularized injury," (2) this injury "is fairly traceable to the challenged conduct," and (3) this injury "is likely to be redressed by a favorable judicial decision." *Id.* at 2661

(citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). *See also id.* ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements.'") (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)).

A litigant cannot satisfy Article III by asserting any possible conceivable harm that might follow from the adjudication of a matter. They must be able to show that they have an "injury in fact," by which is meant "an invasion of *a legally protected interest*" that is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984), and *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (emphasis added). Moreover, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action . . . . and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* at 560-61 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). *Cf. Diamond*, 476 U.S. at 70 (applying precedent "that Art. III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue" to defendant-intervenor's argument that he had standing to pursue appeal independent of state defendants).

Article III's case and controversy requirements apply to both plaintiffs and defendants and "persist throughout all stages of litigation." *Hollingsworth*, 133 S. Ct. at 2661 (citing *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013)). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("Standing to sue or *defend* is an aspect of the case-or-controversy requirement.") (emphasis added). Thus, an intervenor

may not necessarily need to establish Article III standing in the district court if another party with standing is participating in the case, but it cannot independently maintain an appeal without it when the party with standing chooses not to appeal. *Hollingsworth*, 133 S. Ct. at 2662. *See also Diamond*, 476 U.S. at 63-64 ("By not appealing the judgment below, the State indicated its acceptance of that decision . . . . The State's . . . failure to invoke our jurisdiction leaves the Court without a 'case' or 'controversy' between appellees and the State.").[4] At all stages of the litigation, the party seeking to invoke the Court's jurisdiction bears the burden of establishing that Article III standing exists. *Lujan*, 504 U.S. at 561.

## III. ARGUMENT

The State Defendants have chosen not to appeal the Panel's decision, and Appellants do not have Article III standing to maintain this action without them, whether as former members of Congress who represented districts other than CD3, current members of Congress representing districts other than CD3, or "Republican voters." *See* Appellants' Br. Opposing Appellee's Motions to Dismiss or Affirm ("Appellants' Opp. Br."), at 12 (arguing that any alteration of CD3 "will be particularly injurious because they will undo an Appellant's recommendations for his district,

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[4] The U.S. Courts of Appeal are divided as to whether intervenors must independently establish Article III standing to participate in a litigation before a district court and the Court has thus far declined to reach that question. *See Diamond*, 476 U.S. at 68-69 & n.21. The Court need not consider that question here, as it is not presented by the present appeal.

replace a portion of 'his base electorate' with unfavorable Democratic voters, and harm Appellants as Republican voters"). That Cantor and Wolf cannot maintain this appeal based on their status as *former* members of Congress should be self-evident and require no further discussion. But Appellants' assertion that they have constitutionally cognizable injuries because the Panel *may* adopt a map remediating the racial gerrymander in CD3 that, in turn, *could* change the partisan composition of the voters in the district that they represent or in which they reside, and *potentially* ultimately endanger their chances for reelection or their interest as voters in maintaining an 8-3 Republican-Democrat divide among Virginia's congressional delegation, is equally unsustainable.

*First*, Appellants' position is directly contrary to the Court's long-standing precedent that, in a racial gerrymandering case, standing requires a "district-specific" and "personal" injury. *Alabama*, 135 S. Ct. at 1265. There is no defensible basis for a rule that provides that, while voters *challenging* a racial gerrymander must live in the district being challenged, voters or office holders *defending* a racial gerrymander may live anywhere in the Commonwealth. *Id.* (explaining racial gerrymandering claims "directly threaten a voter who lives in the *district* attacked," "[b]ut they do not so keenly threaten a voter who lives elsewhere in the State" and "the latter voter normally lacks standing to pursue a racial gerrymandering claim"). *See also United States v. Hays*, 515 U.S. 737, 739 (1995) (finding voters who "do not live in the district that is the primary focus" in a racial gerrymandering case lack standing).

The district court in *Johnson v. Mortham*, 915 F. Supp. 1529, 1537-38 (N.D. Fla. 1995), recognized as

much, holding that, of three congressional representatives that sought to intervene in a racial gerrymandering lawsuit, only the representative of the district challenged by the lawsuit had standing to do so. This is because a congressional representative from another district—just like a voter who resides in another district—has "no more than a generalized interest in [the] litigation since . . . the possibility of a remedy that would impair their interests in their congressional seat is no more than speculative." *Id.* at 1538. In reaching this decision, the court specifically considered and rejected the argument that a finding for the plaintiffs was likely to affect not just the challenged district, but other districts in the Florida congressional map. It expressly acknowledged that, "[u]ndoubtedly, a finding by the panel that the Third Congressional District is the product of unconstitutional gerrymandering would necessarily require the Florida Legislature to adopt a redistricting plan that would effectively abrogate the [current] plan—and might even result in the redrawing of [proposed intervenors'] districts." *Id.* at 1538. "Nevertheless," it held that the proposed intervenors did not meet Article III's standing requirements. *Id.*

To conclude otherwise would have been contrary to the precedent discussed above, which requires that a voter live in a district to challenge it as a racial gerrymander. This is because *the very nature of redistricting*—in which the drawing of one legally compliant district necessarily affects the drawing of other districts—means that whenever one district must be redrawn due to a constitutional deficiency, there will "undoubtedly" be some effect on other districts in the map. The voter who lives outside the challenged district has the same claim to injury as the member of Congress who represents another district

whose boundaries are "likely" to change if a racial gerrymandering claim is successful. Still, this Court has definitively held that the voter who lives in another district—even a *neighboring* district, such that "it may be true that the . . . composition of" the voter's district "would have been different if the legislature had drawn [the challenged district] in a another way,"—does not have standing to maintain a racial gerrymandering claim. *Hays*, 515 U.S. at 746. Simply put, Appellants are wrong to suggest (as they did in their reply to the motions to dismiss or affirm), that the standing restraints that apply to ordinary voters in relation to racial gerrymandering claims do not apply to either present or former members of Congress, or to "Republican voters." Appellants' Opp. Br. at 12.

*Second*, any harm that Appellants claim—whether as members of Congress who represent districts other than CD3 or Republican voters who reside in districts other than CD3—is too speculative to meet Article III's standing requirements. None of the Appellants have special legal authority for redistricting or the conduct of Virginian elections—those jobs belong to the General Assembly (which did not intervene in this litigation) and the Board of Elections (which has moved this Court to affirm the decision below). Thus, the Panel's decision in and of itself has not caused Appellants any "direct injury," because it "ha[s] not ordered [Appellants] to do or refrain from doing anything." *Hollingsworth*, 133 S. Ct. at 2662-64. Moreover, it is far from clear that whatever remedial map the Panel ultimately adopts will actually "impair" or otherwise injure whatever interests Appellants claim to have in the boundaries or composition of other congressional districts in the Commonwealth.

Indeed, Appellants themselves have submitted two proposed remedial plans for the Panel's consideration. Rather than sitting on the sidelines while the General Assembly redistricts as is ordinarily the case, Appellants have been given the rare opportunity to draw maps in the first instance, which may still be adopted by the Panel below. By Appellants' own description, seven of the current members of Congress among them would retain a majority of Republican voters in their district under these plans. Congressman Rigell, the only Appellant who, even under Appellants' own proposed plans, would see a drop in the Republican vote share in his district would lose "only 0.6%" of those voters. Intervenor-Defendants' Br. In Support of Their Proposed Remedial Plans 13, *Personhuballah v. Alcorn*, No. 3:13cv678 (E.D. Va. Sept. 18, 2015), ECF No. 232. That Appellants have nonetheless argued, for purposes of their appeal, that their injury is "*certain*," Appellants' Opp. Br. at 11, underscores how radical Appellants' claim to standing truly is.

*Third*, Appellants have failed to establish that the injury that they claim, either as representatives of districts other than CD3, or "Republican voters," is a "*legally protected* interest" that can support Article III standing. *Lujan*, 504 U.S. at 560. Taken to its logical (and patently absurd) conclusion, Appellants' argument would confer upon members of Congress, former members of Congress, and voters in general *a legally cognizable interest* in maintaining the precise partisan composition of the voters in the districts that they represent or live in.

This Court has never recognized a legal right following from such a broad and diffuse injury, and for good reason. Under this theory, a member of Congress

would have Article III standing to challenge or defend virtually any law that causes even a miniscule number of voters who have in the past supported a member of Congress to move *from* that member's district—or, alternatively, causes voters that have supported the other party to move *into* that member's district—on the theory that it reduces their partisan vote share and is "likely" to cause them injury by threatening their seat (or, in the case of a "Republican voter," their partisan interest in a member of their own party holding that congressional seat). Thus, one could imagine a member of a party that enjoys disproportionate support among university communities filing suit to challenge the reduction of funding to a university in their district on the ground that the likely result would be that their partisan vote share in the district would be reduced. But this is the very definition of an attenuated harm, which in any other context would plainly not be direct enough or "fairly traceable" to the conduct at issue to support standing. And the harm that Appellants assert is even further afield—they are not the members that represent the district in which the funding for the university has been cut, they are the members of the party that does *not* enjoy disproportionate support among university communities, who represent the *surrounding* districts, and who would file suit (or attempt to defend an adverse judgment on appeal) based on their fear that the cut to the university's funding will displace voters that have supported their *opponents* from the district in which they currently reside into other districts in the state. That such a result would be indisputably absurd exposes the fatal flaws in Appellants' position.

If Appellants are not claiming a legally cognizable interest in maintaining precisely the same partisan balance in the districts that they represent, then their

standing must be based on an assumption that any change to the reapportionment plan is likely to actually harm their chances for reelection. But this alleged harm is also fundamentally flawed. *First*, it assumes that maintaining the same partisan balance—or even a majority partisan voter share—in a district that one represents or lives in is a legally cognizable injury; that this is so is far from clear. *Second*, it further assumes that the Panel will adopt a map that, in remediating the racial gerrymander in a district that none of Appellants represent or live in, will necessarily reduce the Republican electorate in one or more of Appellants' districts substantially enough that the reduction is likely to harm the current Representative's chances at reelection. *Third*, it assumes that the Appellants who are current members of Congress are not likely to lose an election provided that their districts remain as they are currently drawn. Cantor's own experience illustrates that this is not the case: politicians lose elections all of the time for all kinds of reasons.

Given the unpredictability of voters and the myriad of factors that might effect a politician's reelection chances, limiting standing in the gerrymandering context to politicians and voters that represent and reside in the districts that are subject to challenge enforces Article III's case and controversy requirements and guards against precisely what Appellants are attempting to do here—hijack litigation that the named Defendants no longer wish to defend and obtain Supreme Court review based entirely on harms that may never come to pass. Even if Appellants' worst fears were to come true, and one or more of their number lost a bid for reelection, an argument that their loss was the result of changes that were made to remediate a racial gerrymander in another district

would be tenuous at best. *See Lujan*, 504 U.S. at 560-61 (holding Article III requires "a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . traceable to the challenged action . . . and not . . . the result of the independent action of some third party not before the court") (internal quotation marks and alterations omitted).

*Fourth*, Appellants' assertion that they have suffered a cognizable injury as "Republican voters" is indistinguishable from an argument that any voter in the Commonwealth has standing to challenge or defend CD3 as a racial gerrymander. Just as a Republican voter may argue that his interest in maintaining the partisan balance of his district in the face of potential changes to a district elsewhere in the Commonwealth confers standing, a Democratic voter might make the exact same argument about her own district. This is precisely the type of "generalized grievance against allegedly illegal governmental conduct" that the Court has found insufficient to meet Article III's standing requirements in *Hays* and elsewhere. 515 U.S. at 743. *See also id.* at 744 ("We . . . reject appellee's position that 'anybody in the State has a claim[.]'").

*Finally*, Appellants are likely to argue that, if the Court dismisses their appeal on standing grounds and the remedial map does in fact endanger their reelection chances, they will have been deprived of their opportunity to challenge a new map that resulted in their political injury. As noted above, it is not clear that this is a cognizable harm in any event, but even if it were, under such circumstances Appellants may theoretically then have standing to bring a challenge to the Panel's adopted remedial plan, *but only if they can make an argument that the remedy violates their*

*constitutional or statutory legal rights in some way.* That challenge has not yet arisen and is not before this Court. But by asking the Court to entertain their appeal now—an appeal that by Appellants' own admission is based entirely on harms that they are afraid they might suffer when the Panel adopts a map in the future—Appellants are attempting to litigate this future case without the benefit of either an applicable record or asserting any legally cognizable claims. The Court's precedent is clear: Appellants could not have brought this racial gerrymandering claim to begin with and the Court should not permit them to litigate their future fears, untethered from the present reality and without even a legal Complaint to ground them, in these proceedings.

## CONCLUSION

Appellees respectfully submit that the appeal should be dismissed for lack of jurisdiction because Appellants lack standing to pursue it.

Respectfully submitted,

KEVIN J. HAMILTON
ABHA KHANNA
PERKINS COIE LLP
1201 Third Avenue
Suite 4900
Seattle, WA 98101-3099
(206) 359-8000

MARC E. ELIAS
*Counsel of Record*
JOHN M. DEVANEY
ELISABETH C. FROST
PERKINS COIE LLP
700 Thirteenth Street, NW
Suite 600
Washington, D.C. 20005-3960
(202) 654-6200
MElias@perkinscoie.com

*Counsel for Appellees Gloria Personhuballah & James Farkas*

October 13, 2015